UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEXT MILLENNIUM REALTY, L.L.C., and 101 FROST STREET ASSOCIATES,

Plaintiffs,

- against -

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Defendants,

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Third-Party Plaintiffs,

- against -

THE ESTATE OF JERRY SPIEGEL, and ALAN EIDLER, PAMELA SPIEGEL SANDERS, and LISE SPIEGEL WILKS, AS EXECUTORS OF THE ESTATE OF JERRY SPIEGEL,

Third-Party Defendants.

RULE 56.1 STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Case No. CV-03-5985 (ARL)

Plaintiffs and Third Party Defendants as enumerated in the above-captioned action (collectively, the "Plaintiffs"), hereby submit, pursuant to Fed. R. Civ. Proc. 56.1 and the local rules of the Court, this Rule 56.1 Statement in Support of Partial Summary Judgment on Liability against defendants Pufahl Realty Corp., Northern State Realty Corp. and Northern State Realty Co. (collectively "Pufahl Defendants" or "Tenant").[1]

---

[1] This motion is limited to the Pufahl Defendants who were expressly named as the tenants under the Lease or assignees of rights and obligations under the Lease. Additional

A. 89 Frost Street Property is a Facility Under CERCLA

1. The 89 Frost Street Property (hereinafter the "Property") is a Facility under the provisions of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. ("CERCLA"). (New York State Department of Environmental Conservation, Record of Decision, 89 Frost Street Site, Town of North Hempstead, Nassau County, Site Number 1-30-043 L, Operable Unit 01 - Soil (Mar. 2000); New York State Department of Environmental Conservation, Record of Decision, Former Autoline Automotive Site # 1-30-043 I, 89 Frost Street Site # 1-30-043 L, Former Applied Fluidics Site # 1-30-043 M, Frost Street Sites, Town of North Hempstead, Nassau County, Operable Unit 02 – Combined Groundwater (Mar. 2000); New York State Department of Environmental Conservation, Record of Decision, New Cassel Industrial Area Sites, Town of North Hempstead, Nassau County, New York, Off-site Groundwater South of the New Cassel Industrial Area, Operable Unit No. 3, Site Numbers 1-30-043A, 1-30-043B, 1-30-043C, 1-30-043D, 1-30-043E, 1-30-043H, 1-30-043I, 1-30-043K, 1-30-043L, 1-30-043M, 1-30-043P, 1-30-043S, 1-30-043U, & 1-30-043V (Oct. 2003) (hereinafter, collectively, "RODs")).

---

claims have been made against all related defendants under theories of single enterprise liability and joint enterprise liability. There are issues of material fact concerning the liability of Adchem Corp. and Lincoln Processing Corp. under these theories of liability and as owners under the Commander Oil v. Barlo, 215 F.3d 321 (2d Cir. 1999) test. Accordingly, for purposes of this motion, partial summary judgment is limited to the Pufahl Defendants who signed or were assigned rights as tenants under the Lease. It is specifically noted that Adchem Corp. and Lincoln Processing Corp. signed lease termination documents for the Property as Tenant.

2. The RODs identify perchloroethylene (hereinafter "PCE") as a major contaminant of concern at the Property. (Record of Decision, Operable Unit 01 - Soil at 1; Record of Decision, Operable Unit 02 – Combined Groundwater at 1; Record of Decision, Operable Unit No. 3 at 7).
3. PCE has been disposed of on the Property. (See paragraphs 70 – 73 below).
4. Plaintiffs have entered into three Consent Orders with the New York State Department of Environmental Conservation requiring Plaintiffs to remediate the Property (hereinafter, the "Consent Orders"). (In the Matter of the Development and Implementation of a Remedial Program for Operable Unit 1 of an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by 101 Frost Street Associates, Order On Consent, No. W1-0799-00-05, Site Code # 1-30-043I (Jan. 23, 2003); In the Matter of the Development and Implementation of a Remedial Program for an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by Next Millennium Realty, LLC, Order On Consent, No. W1-0799-00-05, Site Code # 1-30-043L (Jan. 23, 2003); In the Matter of the Development and Implementation of a Remedial Program for Operable Unit 1 of an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by Next Millennium Realty, LLC, Order On Consent, No. W1-0893-01-07, Site Code # 1-30-043M (Jan. 23, 2003); Fred Werfel Dep. at 320:3—7, 401:3—8, 419:17—21, Dec. 12, 2012; Arthur Sanders Dep. at 382:4—9. Nov. 29, 2012; Alan Eidler Dep. at 27:13—17, Apr. 5, 2013).

5. Plaintiffs have incurred costs remediating the Property pursuant to the Consent Order Obligations. (Werfel Dep. at 57:8—15; Sanders Dep. at 124:12—23; Eidler Dep. at 21:19—23:2).

6. Certain of the costs incurred by Plaintiffs are consistent with the National Contingency Plan (hereinafter, "NCP").[2] (Phil Coop, Expert Opinion at 5—7 (Apr. 24, 2013); Phil Coop, Supplemental Expert Opinion at 1—3, (Aug. 9, 2013); Phil Coop Dep. at 15:14—24, 28:19—30:8, Aug. 13, 2013; Gary J. DePippo, Expert Opinion at 1-1 (July 22, 2013); Gary DePippo Dep. at 28:16—30:10, Sept. 5, 2013).

B. <u>Formation of Lease/Purchase Agreement</u>

7. Between October 10, 1958 and July 10, 1995 Jerry Spiegel (hereinafter "Landlord") was the owner of record of the Property. (Title Report at SFSP Response 1 at pages 28-31).

8. On April 1, 1966, defendant Pufahl Realty Corp. entered into a lease with a purchase option with Landlord for the Property (hereinafter the "Lease"). (Lease Agreement between Jerry Spiegel and Pufahl Realty Corp. (Apr. 1, 1966)).

9. After entering into the Lease, Pufahl Realty Corp. changed its name to Northern State Realty Corp. (John Pufahl Dep. at 66:13—21, Apr. 8, 2013; Elliot Miller Dep. at 14:3—8, 15:1—4, Oct. 15, 2013).

10. Sometime before 1973, Northern State Realty Corp. assigned the Lease to a newly formed general partnership called Northern State Realty Co. (Miller Dep. at 14:24—15:4, 41:1-6, 104:6—25; Charles Pufahl Dep. at 35:12—24, Jan. 16, 2013; John Pufahl Dep. at 64:12—17).

[2] Plaintiffs Motion for Partial Summary Judgment is limited to liability. Material issues of fact exist as to which of the expenses incurred are compliant with the NCP. There is a general agreement between the parties that some of the expenses are NCP compliant.

11. Pursuant to the terms of the Lease, Landlord agreed to a build-to-suit arrangement with Tenant, whereby Landlord agreed to build a 55,000 square foot manufacturing facility for Tenant. (Lease at ¶ 33).

12. Pufahl Defendants desired to own the Property and negotiated a purchase option into the Lease. (Lease at ¶ 65; Miller Dep. at 31:18—23, 70:15-24, 107:8—11; Letter from Joseph Pufahl, Partner, Northern State Realty Co., to Jerry Spiegel (June 4, 1976)).

13. At all relevant times, three brothers, Charles Pufahl, Joseph Pufahl and Herman Pufahl (hereinafter, the "Pufahl Brothers"), were the beneficial owners, managers and operators of each of the Pufahl Defendants. (John Pufahl Dep. at 7:7—11, 25:21—24, 67:9—23, 70:21—25, 103:19—104:2; Charles Pufahl Dep. 20:4—14, 33:11—21, 35:8—11, 35:25—36:14, 36:22—25; Miller Dep. at 14:3—15:4).

14. The Pufahl Brothers were eager to own the properties they leased as they viewed it as a good economic decision. (Miller Dep. at 31:11—23, 70:15—24 107:15—108:3).

15. The Pufahl Brothers were very much interested in creating property ownership for themselves and their families. (Miller Dep. at 74:18—25).

16. Landlord did not desire to give a purchase option on the Property and reluctantly acquiesced to the purchase option on the Property after negotiations. (Miller Dep. at 70:15—24).

C. <u>Lease Term and Use Provisions</u>

17. The Lease had a term of 20 years from 1966 to 1986. (Lease at page 1).

18. The Lease contained no restrictions on the Tenant such as hours of operation, the number of employees in the building, or the type, location and quantity of manufacturing equipment to be installed by the Tenant. (<u>See generally</u>, Lease).

19. The Lease allowed Tenant to use the Property for all "general manufacturing purposes not in violation of the building zone ordinance." (Lease Addendum at ¶ 15).

20. Tenant had the right and privilege to remove any and all improvements to the Property without Landlord consent. (Lease at ¶ 31).

D. Lease Termination Provisions

21. Landlord did not have any right of early termination at its option. (See generally, Lease).

22. The Lease could only terminate early upon the following limited circumstances, all of which were beyond Landlord's control and either in Tenant's exclusive control or the control of third-parties: (1) Tenant's default of the Lease; (2) Pufahl Defendant's exercise of its option to purchase the Property; (3) the building is destroyed by fire; and (4) eminent domain if it substantially affects the ability of Tenant to use its equipment and machinery. (Lease at ¶¶ 5, 8, 47, 65).

E. Pufahl Defendants' Right to Sublet

23. Pufahl Defendants had the right to assign or sublet the Property. (Lease at ¶ 34).

24. The Lease contained no restrictions on the right to assign or sublet the Property. (Lease at ¶ 34).

25. The Tenant had the right to sublet the Property without Landlord's consent. (See Lease at ¶ 34).

F. Payment of All Taxes, Assessments, Insurance, and Operation and Maintenance Costs

26. Pursuant to the terms of the Lease, Tenant, at its own cost and expense, was responsible for paying all taxes, assessments, insurance and operation and maintenance costs for the Property. (Lease at ¶¶ 2, 19, 28, 30, 35, 36, 37, 44A, 58, 61, 67).

27. There was no diminution or abatement of rent, or other compensation, in the event of inconvenience or discomfort arising from the making of repairs or improvements to the building or to its appliances. (Lease at ¶ 26).

28. Tenant had to obtain utilities for the Property and pay for its consumption of fuel, gas, electricity and water. (Lease at ¶ 28).

29. Tenant was solely responsible for insurance cost for liability, casualty and boiler insurance covering personal injury and property damage, and covering the entire leased Property. (Lease at ¶ 30).

30. Tenant was responsible for paying rent loss insurance. (Lease at ¶ 70).

31. Tenant was responsible for paying all fire insurance premiums for the Property. (Lease at ¶ 35).

32. Tenant was responsible for reimbursing Plaintiff for all taxes, charges and impositions. (Lease at ¶ 37).

33. Landlord was not liable for maintenance or repair of heating, plumbing or sprinkler systems or sanitary systems or to make any other repairs, decorations or alterations or to furnish heat, hot water, gas electricity, or any other utility or service. (Lease at ¶ 67).

34. Tenant was responsible for connecting, at its own expense, sewer lines installed and brought to the Property. (Lease at ¶ 44A).

35. Tenant was responsible for the removal of rubbish, snow and ice and for landscaping. (Lease at ¶¶ 58, 61).

G. <u>Non-Structural and Structural Repairs</u>

36. Landlord, as builder of the building on the Property, agreed to "guarantee" the quality of the building constructed on the Property by agreeing to make all repairs to the building

during the first two (2) years of the lease term, except repairs occasioned by act or neglect of Tenant. (Lease at ¶ 39).

37. After the first two years of the lease term, Landlord was only responsible for making structural repairs to the exterior and interior bearing walls, foundation, floor slab, roof deck and structural steel. Tenant was responsible for all other structural repairs. (Lease at ¶ 39; Lease Addendum at ¶ 4).

H. Other Factors Indicative of Pufahl Defendants' De Facto Ownership

a. Pufahl Defendants Carried the Risk of Loss

38. Pufahl Defendants bore the risk of loss. Pufahl Defendants were not entitled to any compensation for the destruction of the Property by fire or condemnation. (See Lease at ¶¶ 12, 60).

39. Landlord was "exempt from any and all liability for any damage or injury to person or property caused by [or] resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building [or] from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or be due to the negligence of the Landlord." (Lease at ¶ 12).

40. Landlord was not liable "whatsoever for any injury or damage to any property or to any person happening on or about the demised premises, nor for any injury or damage to any property of Tenant, or of any other person contained therein." (Lease at ¶ 60).

b. Pufahl Defendants Managed the Property Through a Net Lease

41. There was no diminution or abatement of rent, or other compensation, in the event of inconvenience or discomfort arising from the making of repairs or improvements to the building or to its appliances. (Lease at ¶ 26).

42. If part of the Property was condemned, but not the building, the rent would not be abated. (Lease at ¶ 47).

43. Tenant was required to maintain twelve (12) months of rent interruption insurance coverage so that there would be sufficient funds to make rent payments following a fire. (See Lease at ¶ 70).

44. The rent would not abate following a fire or other casualty rendering the Property uninhabitable. (See Lease at ¶ 70).

c. Pufahl Defendants Maintained Exclusive Control and Possession

45. Tenant was in exclusive control over the Property and was in exclusive possession of the Property. (Lease at ¶ 60).

46. Landlord did not have any dominion or control over the Property. (Lease at ¶ 67) ("the exercise by Landlord of any of its said rights or privileges [shall not] be considered as an assumption of dominion or control over the demised premises or any portion thereof.").

47. The provisions in the Lease permitting Landlord to enter and inspect the Property were "made for the purpose of enabling Landlord to be informed as to whether Tenant is complying with the agreements, terms, covenants and conditions hereof, and to do such as acts as Tenant shall fail to do." (Lease at ¶ 60).

48. Landlord was not allowed to enter the factory without notice to and supervision by Tenant. (Lease Addendum at ¶ 11).

49. Landlord originally proposed a clause in the Lease allowing Landlord to use the easterly wall of the building on the Property to benefit Landlord's adjoining property should a building be constructed on the adjoining lot. (See Lease at ¶ 73). Pufahl Defendants objected to this clause and it was stricken from the lease. (See Lease at ¶ 73).

50. Tenant had the right to contest charges, liens, assessments and other impositions with the appropriate governmental department. (Lease at ¶ 36).

d. Pufahl Defendants Held An Option To Purchase

51. Pufahl Defendants had the option to purchase the Property in the twelfth (12th) year of the lease term for $490,000.00. (Lease at ¶ 65).

52. The replacement cost of the building (excluding the land and foundations) was $820,000 when the building burned down in 1976. (Complaint at ¶¶ 8—9, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976)).

I. Marvex Corp. Sublease

53. In 1973, Northern State Realty Co. entered into a sublease (hereinafter "Sublease") with 89 Frost Property Corp. (Sublease between Northern State Realty Co. and 89 Frost Street Leasing Corp. (May 22, 1973)).

54. Northern State Realty Corp assigned its rights under the Lease to Northern State Realty Co. prior to the negotiation and execution of the Sublease. (Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); John Pufahl Dep. at 64:12—17; Charles Pufahl Dep. at 35:12—24; Miller Dep. at 104:6—21).

55. 89 Frost Property Corp. was an affiliated company to Marvex Corp. (hereinafter "Marvex or "Subtenant"), the party that occupied and conducted textile manufacturing activities at 89 Frost Street between 1973 and 1976. (Rental Invoice at AA00189 (Dec. 24, 1975); Fred Margolin Dep. at 8:21—9:10; 10:4—8, Sept. 16, 2013; Charles Pufahl Dep. at 51:2—4, 70:11—16; Miller Dep. at 117:7—9; Dieter Kannapin Dep. at 8:21—9:6, Oct. 8, 2013).

56. Marvex occupied the 89 Frost Street Property and conducted operations at the Property pursuant to the terms of the Sublease. (Margolin Dep. at 8:21—9:10, 10:4—8; Charles Pufahl Dep. at 51:2—4, 70:11—16; Miller Dep. at 117:7—9).

57. Landlord had no involvement with the Sublease. (John Pufahl Dep. at 228:2—6, Apr. 16, 2013; Charles Pufahl Dep. at 105:22—106:10; Margolin Dep. at 9:14—24).

58. Landlord had no involvement with the placement of the Subtenant in the Property. (John Pufahl Dep. at 228:2—6; Charles Pufahl Dep. at 105:22—106:10; Margolin Dep. at 9:14—24).

59. There is no documentation or information indicating that Landlord was notified of the sublease of the Property to Marvex. (John Pufahl Dep. at 228:2—6; Charles Pufahl Dep. at 105:22—106:10; Margolin Dep. at 9:14—24).

60. Landlord was not requested to consent to the sublet of the Property to Subtenant and did not consent to the sublet of the Property to Subtenant. (John Pufahl Dep. 228:7—9).

61. Subtenant agreed to pay $113,100 in annual base rent for the first two years and $121,800 in annual base rent thereafter to the Pufahl Defendants from 1975 to 1986. (Sublease at page 2).

62. Tenant paid Landlord $55,565 in annual rent under the Lease. (See Lease at ¶¶ 33, 38). Therefore, all of the profit derived from the Sublease was received and retained solely by Tenant. The gross profit realized by Tenant pursuant to the Sublease amounted to approximately $57,500 per year for the first two years and $66,000 per year thereafter. (See Sublease at 2). Landlord did not share in any of the profits derived by the Tenant from the Sublease of the Property. (See Lease at ¶ 38; See Sublease at 2).

63. The Sublease was for a term of the balance of the Lease. (See Sublease at page 1).

64. Pursuant to the terms of the Sublease, the Pufahl Defendants agreed to expand the current septic system by adding three new leaching sections in the drainage system. (Sublease at page 7).

J. <u>Oversight of Marvex</u>

65. The Pufahl Brothers were aware of the use of PCE by Marvex at the facility. (John Pufahl Dep. at 90:3—14; Charles Pufahl Dep. at 54:9—17; Margolin Dep. at 14:24—15:9; Bernard T. Delaney Expert Opinion at 5 (Oct. 2013); Letter from Daniel Riesel, legal counsel for Adchem Corp., to New York State Department of Environmental Conservation, at page 3 (Aug. 2, 1996)).

66. John Pufahl observed the operations of Marvex utilizing PCE at the Property. (John Pufahl Dep. at 88:23—90:17, 93:5—17).

67. The Pufahl Brothers and John Pufahl periodically visited the Property during the term of the Sublease. During some of these visits, the use of PCE was observed. (John Pufahl Dep. at 93:24—94:10).

68. The Pufahl Defendants were aware of the use of PCE at the Property by the Subtenant. (John Pufahl Dep. at 93:24—94:10).

69. There is no evidence in the record that Landlord or anyone from Jerry Spiegel Associates[3] visited the Property or were aware of the activities of the Subtenant at the Property. (John Pufahl Dep. at 228:2—6; Charles Pufahl Dep. at 105:22—106:10; Margolin Dep. at 9:14—24).

70. The Pufahl Defendants were aware that the Property was on a private septic and not a municipal sewer system. (Charles Pufahl Dep. at 85:5—12). Under the terms of the

[3] Jerry Spiegel Associates was the real estate management firm of Jerry Spiegel at all relevant times.

Sublease, the Pufahl Defendants agreed to expand the septic system by the addition of three new leaching sections in the drainage system. (Sublease at page 7).

71. The Property was not on municipal sewer during the Tenant's occupancy of the Property. (Charles Pufahl Dep. at 85:5—12; See Sublease at page 7). The expansion of the septic system by Tenant for the Subtenant was an expansion of the on-site septic system that manufacturing waste was discharged into, resulting in the creation of the contamination that exists on the Property. (See Source Area Delineation Summary Report: 89 Frost Street, Westbury, Nassau County, New York, at 3—4 (Roux Associates, Inc., May 3, 2012); See Draft Focused Feasibility Study: Frost Street Site, Westbury, New York, at 1-2, 1-6, 2-5, 2-9 (EnSafe, Inc., Aug. 2012)).

72. Through its manufacturing activity, Marvex contributed PCE to the Property. (Bernard T. Delaney Expert Opinion at 5, 16, 18, 21 (Oct. 2013); See Margolin Dep. at 15:2—9; See Charles Pufahl Dep. at 54:9—17; See Kannapin Dep. at 16:18—24).

73. Marvex also contributed PCE to the Property following a fire that destroyed the building on the Property, dry cleaning equipment and storage tanks. (Bernard T. Delaney Expert Opinion at 5, 16, 18, 21 (Oct. 2013)).

K. Lease Termination Following Fire

74. On May 30, 1976, a fire destroyed the Property. (Letter from Jerry Spiegel to Northern State Realty Co. (June 24, 1976); Miller Dep. at 75:4).

75. Following the fire, Jerry Spiegel terminated the Lease. (Letter from Jerry Spiegel to Northern State Realty Co. (June 24, 1976); Miller Dep. at 75:15—24).

76. Tenant sued Landlord seeking to enforce the option contained in the Lease to purchase the Property. (Complaint at ¶ 12, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976); Miller Dep. at 75:25—77:4).

77. The Tenant alleged in the lawsuit that the value of the Property was up to $820,000 exclusive of the value of the land and foundation. (Complaint at ¶¶ 8—9, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976)).

78. The litigation was settled with Jerry Spiegel paying the Pufahl Defendants $75,000 to terminate their purchase option rights under the Lease. (Settlement Agreement Stipulation, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County 1976) (Apr. 20, 1977); Miller Dep. at 76:18—77:4).

79. The attorney representing the Tenant in the litigation recalled that the $75,000 payment by Landlord to the Pufahl Defendants was "compensation for not having the real estate." (Miller Dep. at 77:1—4).

Dated: November 11, 2013
Windham, New York

_____/S_____
Kevin E. Maldonado, Esq. (KM7351)
5 Hickory Hill Road
Windham, New York 12496
(518) 727-8149